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The U.S. Supreme Court made it easier for workers to show they suffered retaliation after filing a complaint of work-related discrimination or harassment.

Retaliation Lawsuits:

On June 22, 2006, the U.S. Supreme Court made it easier for workers to show they suffered retaliation after filing a complaint of work-related discrimination or harassment. The unanimous decision by the Court is being regarded by most legal experts as an employee-friendly decision that may increase litigation against employers.

This article examines the ramifications of this Supreme Court case (*Burlington Northern & Santa Fe Railway Company v. White, No. 05-259*) and what emergency services organizations can do to prevent retaliation. Sound risk management measures can be taken by your organization to help abide by the Court ruling and strengthen the work environment.

Retaliation Claims Already on the Rise

Even before the recent Supreme Court decision, retaliation claims have been a steadily growing part of employment law. In 2004 there were over 20,000 retaliation claims filed with the Equal Employment Opportunity Commission (EEOC), a number that has doubled since 1992. Retaliation claims now account for around 25% of the charges filed with the EEOC, the federal agency responsible for enforcing laws against discrimination in employment. The Supreme Court's ruling may contribute to a future rise in retaliation claims.

What Did the Court Decide?

Burlington Northern & Santa Fe Railway Company v. White gave the Court the opportunity to address the type of retaliation prohibited by Title VII of the Civil Rights Act of 1964 (Title VII), the federal law protecting against employment discrimination based on race, color, religion, sex, or national origin. In what is referred to as the anti-retaliation provision of Title VII, an employer is prohibited from discriminating against an employee or job applicant because that individual opposed any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation. In essence, the anti-retaliation provision seeks to prevent discrimination by allowing unfettered access to complaint mechanisms. Retaliation or threats of retaliation foster discrimination.

What is retaliation? Some forms of retaliation are easy to identify, such as termination, demotion, failing to promote, or decreasing pay or benefits. These concrete examples of retaliation are often referred to as taking "adverse tangible employment action" or "actions that affect the terms and conditions of employment".

Other forms of retaliation for making a discrimination complaint can also include, but are not limited to:

- Reassignment of job duties with significantly different responsibilities
- Transferring shifts and/or place of work
- Imposing unreasonably unpleasant work assignments
- Reduction of number of hours or shifts
- Denial of training opportunities
- Unjustified negative performance evaluations

Continued

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- Reprimands, suspensions, or other disciplinary action
- Intimidating, threatening, harassing or otherwise deterring a worker from filing a discrimination complaint by actions that occur within or outside of the work environment.

"Materially adverse" action. In determining what conduct qualifies as actionable retaliation, the Supreme Court held that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means the action well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The Court uses the terminology "material adversity" to separate significant from trivial harms. The Court believes the objective standard of assessing whether a reasonable person would find the actions materially adverse will screen out trivial conduct or petty slights while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

In determining whether conduct qualifies as materially adverse, context is relevant. Actions may be materially adverse to one worker but not to another, depending upon their circumstances. The example set forth by the Court involves an employer that changes a worker's schedule after complaining of job discrimination. A schedule change may make little difference to many workers, but may constitute a materially adverse action to a female worker with young children, rendering it much more difficult, if not impossible, for her to care for her kids. An act may be immaterial in some situations and material in others.

Risk Management Measures

Especially given the Supreme Court's recent decision, protecting all members of your emergency services organization (ESO) from unlawful retaliation should be a focus. In addition to providing a comprehensive anti-retaliation policy, other risk management measures can be taken to prevent retaliation.

Involve legal counsel. Utilize an attorney with experience in labor and employment matters to address discrimination or harassment complaints. Your ESO is under an obligation to conduct a prompt, thorough, and effective investigation, as well as document its non-retaliation measures. Rely on legal counsel to ensure your ESO is taking the necessary steps to protect all personnel and the organization.

Carefully assess changes after a complaint of discrimination is made or a worker participates in the investigation. Perceptions can be reality. All changes, particularly significant changes in an employee's responsibilities or working conditions, can be perceived as retaliation. Be aware of how a job transfer, reallocation or lessening of responsibilities, denial of a promotion, negative performance evaluation, or other actions may be perceived as retaliation.

Monitor the work environment and increase communication. In order to detect possible retaliation, your ESO must monitor the work environment and frequently communicate with all persons involved in a discrimination complaint. Facilitate face-to-face meetings whenever possible to help encourage parties to step forward and inform the ESO of any real or perceived retaliation or mistreatment.

Make it clear that no member of your ESO is required to confront the person or people who commit alleged retaliation. Instead, inform workers of the multiple safe avenues of internal complaint that are available should retaliation occur. Also, make it known that your ESO may utilize a neutral third-party investigator to help resolve the underlying discrimination complaint and/or retaliation allegations.

Anti-retaliation measures should be taken during the course of the discrimination investigation and after the perceived resolution of the matter. Often retaliation occurs well after the completed investigation and discipline is determined. Just because a discrimination incident is perceived to be resolved does not mean retaliation can not still occur in the days, weeks, and months thereafter. Check in periodically with involved parties and reinforce available internal reporting processes in the event of future retaliation.

Train supervisors on retaliation prevention. It is important to demonstrate that your ESO takes reasonable measures to prevent retaliation. Educate supervisory personnel on their responsibilities to prevent discrimination and retaliation. Train supervisors on "red flags" that retaliation may be taking place, such as:

- Ignoring or isolating a coworker
- Refusing to work with a coworker or group of coworkers
- Requesting a transfer or resigning
- Suddenly missing work, consistent tardiness, or a drop in job performance
- An ESO member becoming uncommunicative
- Arguments or other examples of tension.

Conclusion

When the Supreme Court speaks, ESO leaders should listen. Take measures to protect all personnel and the ESO from the harmful effects of workplace retaliation.

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